

Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1875, C.c-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO
GROWTHWORKS CANADIAN FUND LTD.

RESPONDING MOTION RECORD

January 3, 2023

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TAB 1

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**ONTARIO
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BETWEEN:

GROWTHWORKS WV MANAGEMENT LTD.

Applicant

and

GROWTHWORKS CANADIAN FUND LTD.

Respondent

AFFIDAVIT OF DEREK LEW

I, Derek Lew, of the City of Vancouver, in the Province of British Columbia, MAKE
OATH AND SAY:

1. I am the President and Chief Executive Officer of GrowthWorks WV Management Ltd. (“**GrowthWorks**”) the former manager of GrowthWorks Canadian Fund Ltd. (the “**Fund**”), and, as such, have personal knowledge of the facts to which I depose, except where I have indicated that I have obtained facts from other sources, in which case I believe those facts to be true.

2. This affidavit is provided in support of the Former Manager's claim that it is entitled to a payment on dissolution of \$672,390.61 on account of the Class C shares that it holds (the "IPA Shares").

3. One way that the Former Manager was compensated was based on the Fund's investment performance as managed by the Former Manager. This was accomplished by issuance to GrowthWorks of 100 Class C shares of the Fund (the "IPA Shares") that had share rights that provided for payment of performance compensation. The Former Manager is the sole owner of Class C shares of the Fund which were specifically created for the manager of the Fund.

4. The performance compensation, called incentive participation amount ("IPA"), was calculated as a percentage of the realized gains and income from each of the Fund's individual investments provided certain conditions were met. The conditions for IPA Compensation to become payable were substantial and ensured that the other classes of shareholders of the Fund had received the substantial benefit of the investment performance before the IPA was earned by the Former Manager. The conditions included a performance threshold for the Fund's entire portfolio, an even higher minimum performance threshold for the individual investment and there was a requirement that the Fund receive back cash equal to the cash used in the initial investment on the investment's disposition. All of the conditions had to be present before IPA became payable to the Former Manager.

5. Once it was earned, IPA payable to the former Manager appeared as a liability on the Financial Statements of the Fund.

6. At the trial before the Honourable Justice Wilton-Siegel, the Former Manager claimed for the unpaid IPA triggered by its termination as manager of the Fund. Its claim

for payment because of termination was dismissed. What was expressly not determined was whether the Former Manager was entitled to payment of the earned IPA on a Dissolution Event which was determined by different contractual language than the payment triggered on termination (as explained in more detail below). Specifically, paragraph 2 of the Judgment stated:

“2. **THIS COURT ORDERS** that the claim of the Former Manager for \$672,390.61 for unpaid incentive payments amounts (“IPA”) as a result of the termination of the Management Agreement, *but not any potential claim for IPA based on a Dissolution Event as defined in the Article of Amendment for Class C Shares (which potential claim was not before the court on this trial)*, is dismissed.” [Emphasis Added]¹

7. Significantly, it was not disputed at trial that the IPA was earned. Also, the amount of the IPA earned was not disputed by the Fund at trial. At paragraph 380 of the Reasons for Decision of the Honourable Justice Wilton-Siegel dated May 18, 2018 (the “Reasons”), His Honour found as it relates to both the earned nature of the payment and its quantum that:

“The Fund does not dispute that this amount was earned in the sense that the Form Manger is entitled to receive dividends in such amount pursuant of the provisions of section 4.2(d)(i) of the share conditions of the IPA Shares, subject to compliance with the terms of that provision.”

8. At trial, a calculation of the quantum of the value of the IPA payment was put into evidence by the Former Manager: \$672,390,61. Annexed hereto and marked as

¹ Found at Exhibit “E” to the Affidavit of Ian Ross sworn December 2, 2022 (“Ross Affidavit”)

Exhibit “A” to this affidavit is a true copy of a chart setting out how the Former Manager calculated that amount.

9. Put another way, the Reasons have already determined that the Former Manager has an “earned IPA” and the quantum of that “earned IPA” is \$672,390.61.

10. The Former Manager continues to rely upon the findings in the Reasons that it is entitled to an earned IPA of \$672,390.61.

11. As such, it is the Former Manager’s position that the IPA has been earned, and its quantum fixed. On the occurrence of a Dissolution Event, the Former Manager is entitled to payment of an amount equal to the IPA dividends owing by the Fund, whether or not the dividend has been declared (the Dissolution Amount defined below).

12. At trial, and in the Reasons, the Court considered Part 4.2(f) of the Certification of Amendment, which addressed payment to the Former Manager of the IPA upon “Manager Termination”. The rights of the Class C Shares/IPA Shares are found in Part 4 of the Certificate of Amendment of the Fund dated November 10, 2003. This document is found at Exhibit “L” of the Ross Affidavit.

13. The Certification of Amendment specifically contains a provision to deal with payment of a “Dissolution Amount” at Part 4.2(e). What is significant is that the language used under “Manager Termination” is materially different from the language for “Dissolution Amount”.

14. Part 4.2(e) provides:

“Dissolution Amount – Upon a Dissolution Event, the holder of IPA Shares shall be entitled to receive an amount equal to the sum of:

- (i) All declared but unpaid dividends on the IPA Shares; and,
- (ii) An amount equal to the cumulative dividends to which the holder of the IPA Shares would have been entitled pursuant to paragraph (d) above, whether or not dividends were actually declared by the directors, assuming that all Venture Investments had been disposed of as of the date of the Dissolution Event at the estimated fair value of such investments calculated in accordance with the Corporations’ usual valuation policies.

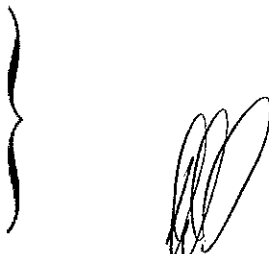
15. The material difference in the language between “Manager Termination” and “Dissolution Amount” is in subparagraph (ii). Under Manager Termination in Part 4.2(f)(ii), the word “dividends” precedes “in an amount equal to”. For the Dissolution Amount, the amount payable to the Former Manager is not a dividend, but rather an amount equal to cumulative dividends. As it is not a dividend then:

- (a) It is not required to be declared by the directors; and,
- (b) As such, the test addressed by the Fund in the Ross Affidavit is not applicable in order for “an amount equal to” to be payable on a Dissolution Event.

16. In subparagraph (ii) there is also reference to the disposition of the Venture Investments. As the IPA has already been earned, this provision is not relevant. The Venture Investments in question and as set out in Exhibit “A” were disposed of prior to the trial

and result in the determination of the IPA amount and as set out above the quantum was not challenged by the Fund.

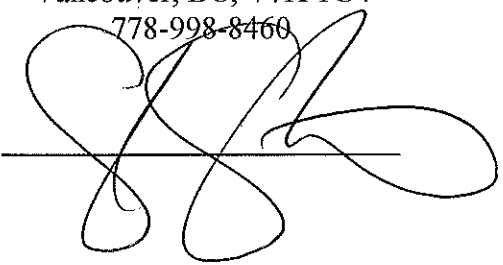
SWORN OR AFFIRMED BEFORE ME
at the City of Vancouver, in the Province of
British Columbia, before me in the City of
Vancouver, on 23rd day of December, 2022



Commissioner for Taking Affidavits
(or as may be)

DEREK LEW

Sarah Sidhu
Barrister & Solicitor
3104 – 1055 Dunsmuir Street,
Vancouver, BC, V7X 1G4
778-998-8460



TAB A

GrowthWorks Retail Venture Capital Funds
~ summary of IPA by Fund as at August 31, 2013

		CDN	
\$ million	<u>Pending</u>	<u>Investee</u>	<u>IPA</u>
Payable	Final approval		
		xkoto Inc.	\$ 183,321.00
		GeminX Biotechnologies Inc.	\$ 304,643.82
		Vitana Corporation	\$ 88,500.00
		Paymentus Corp.	\$ 95,844.79
			(2)
	<u>Total Payable</u>		<u>\$ 672,309.61</u>

GW Canadian Fund Ltd. (Initial divestment: May 12, 2010; Holdback proceeds: May 19, 2011 & Nov 19, 2011)						
<u>xKoto Inc. - Divestment Proceeds Analysis and IPA Calculations:</u>						
Date of Initial Investment:	05/08/2006			<u>Required IRR:</u>	12%	
Date of Initial Divestment:	05/12/2010					
Date of Holdback Received:	05/19/2011					
Date of Holdback 2 Received:	11/19/2011					
Years outstanding to Initial divestment:	4.01					
Years Outstanding (including Holdback 1):	5.03					
Years Outstanding (including Holdback 2):	5.54					
<u>Proceeds at Closing:</u>						
Historical cost of investment		<u>FX Rate</u>	<u>USD</u>	\$	6,534,964	Principal Test Passed?
Actual Proceeds received upon closing		1.0170	9,488,524		9,649,829	YES
Realized gain on proceeds received upon closing					3,114,865	
Total return on investment (base for IPA calculation)					3,114,865	IRR Test Passed?
				ROI	48%	
				IRR	22%	YES
<u>Holdback Proceeds Received:</u>						
		<u>FX Rate</u>	<u>USD</u>		<u>CAD</u>	
Divestment proceeds received after 1 year = additional return				-	673,072	
Divestment proceeds due in 1.5 years = additional return				-	916,605	
Total return on investment including holdback amount:					\$ 4,704,542	IRR Test Passed?
				ROI	72%	
				IRR	26%	YES
<u>xKoto - IPA Payable Calculation:</u>						
Base investment earnings for IPA purposes					\$ 3,114,865	
Earnings participation entitlement					20%	
Total IPA previously paid to the Manager					622,973	paid
<u>xKoto - Holdback Proceeds 1 - IPA Payable Calculation:</u>						
		<u>FX Rate</u>	<u>USD</u>		<u>CAD</u>	
Divestment proceeds received 1 year after initial divestment				-	\$ 673,072	
Earnings participation entitlement					20%	
Total IPA previously paid to the Manager					134,614	paid
<u>xKoto - Holdback Proceeds 2 - IPA Payable Calculation:</u>						
		<u>FX Rate</u>	<u>USD</u>		<u>CAD</u>	
Divestment proceeds received 1.5 years after initial divestment				-	\$ 916,605	
Earnings participation entitlement					20%	
Total IPA Payable to the Manager					183,321	

GW Canadian Fund Ltd. (Initial divestment: April 15, 2011; Holdback proceeds: January 13, 2012 & November 15, 2012)						
GeminX - Divestment Proceeds Analysis and IPA Calculations:						
Date of Initial Investment:	05/22/2009			<u>Required IRR:</u>	12%	
Date of Initial Divestment:	04/15/2011					
Date of Holdback 1 Received:	01/13/2012					
Date of Holdback 2 Received:	11/15/2012					
Days Outstanding:	693					
Years outstanding to Initial divestment:	1.90					
Years Outstanding (including Holdback 1):	2.65					
Years Outstanding (including Holdback 2):	3.49					
<u>Proceeds at Closing:</u>						
Historical cost of investment			<u>FX Rate</u>	<u>USD</u>	\$ 6,978,659	Principal Test Passed?
Actual Proceeds received upon closing					11,040,576	YES
Realized gain on proceeds received upon closing					4,061,917	
Total return on investment (base for IPA calculation)					4,061,917	IRR Test Passed?
				ROI	58%	Passed?
				IRR	27%	YES
<u>Holdback Proceeds:</u>						
			<u>FX Rate</u>	<u>USD</u>	<u>CAD</u>	
Divestment proceeds Instalment #1 received as per milestone agreement					960,538	
Divestment proceeds Instalment #2 received as per milestone agreement					943,486	
Total return on investment including holdback amounts:					\$ 5,965,940	IRR Test Passed?
				ROI	85%	Passed?
				IRR	16%	YES
GeminX - IPA Payable Calculation:						
Base investment earnings for IPA purposes					\$ 4,061,917	
<u>less:</u> amount to be distributed to Roseway (per IPA workbook analysis):					(812,383)	
Adjusted earnings participation entitlement					\$ 3,249,533	
Earnings participation entitlement					20%	
Total IPA previously paid to the Manager					649,907	paid
GeminX - Holdback Proceeds IPA Payable Calculation #1:						
			<u>FX Rate</u>	<u>USD</u>	<u>CAD</u>	
Divestment proceeds due over time (base for IPA liability calculation)					\$ 960,538	
<u>less:</u> amount to be distributed to Roseway (per IPA workbook analysis):					(192,108)	
Adjusted earnings participation entitlement					\$ 768,430	
Earnings participation entitlement					20%	
IPA Payable to the Manager related to Calculation #1					153,686	
GeminX - Holdback Proceeds IPA Payable Calculation #2:						
			<u>FX Rate</u>	<u>USD</u>	<u>CAD</u>	
Divestment proceeds due over time (base for IPA liability calculation)					\$ 943,486	
<u>less:</u> amount to be distributed to Roseway (per IPA workbook analysis):					(188,697)	
Adjusted earnings participation entitlement					\$ 754,789	
Earnings participation entitlement					20%	
IPA Payable to the Manager related to Calculation #2					150,958	
Total IPA Payable to the Manager					\$ 304,644	

GW Canadian Fund Ltd.							
Vitana Corporation - Divestment Proceeds Analysis and IPA Calculations:							
Initial Investment:	12/11/2005				<u>Required IRR:</u>	12%	
Date of Disposition:	08/03/2010						
Days Outstanding:	1,696						
Years Outstanding:	4.65						
Cumulative interest payments received over life of investment						\$	70,120
Total interest earned on debenture							70,120
<u>Proceeds at Closing:</u>							
Historical cost of investment				FX Rate	USD	\$	642,500
Actual Proceeds received upon closing				1.0000	-		1,085,000
Realized gain on proceeds received upon closing							442,500
Total return on investment (base for IPA calculation)							512,620
					ROI		80%
					IRR		59%
Vitana Corporation - IPA Payable Calculation:							
Base investment earnings for IPA purposes						\$	442,500
Earnings participation entitlement							20%
Total IPA Payable to the Manager							88,500

GW Canadian Fund Ltd. : (Initial divestment: August 31, 2011; Holdback proceeds: April 20, 2012, Holdback proceeds March 25, 2013)						
Paymentus - Divestment Proceeds Analysis and IPA Calculations						
Initial Investment:	07/13/2007			<u>Required IRR:</u>	12%	
Date of Disposition:	08/30/2011					
Date of Holdback Receipt:	04/20/2012					
Days Outstanding:	1,509					
Years outstanding to Initial Investment:	4.13					
Years Outstanding (including holdback period):	4.78					
<u>Proceeds at Closing:</u>						
Historical cost of investment		<u>FX Rate</u>	<u>USD</u>	\$	1,500,000	Principal Test Passed?
Actual Proceeds received upon closing		1.0000	-		2,668,525	YES
Realized gain on proceeds received upon closing					1,168,525	
Total return on investment (base for IPA calculation)					1,168,525	IRR Test Passed?
				ROI	78%	
				IRR	15%	YES
<u>Holdback Proceeds:</u>						
Divestment proceeds received over time		<u>FX Rate</u>	<u>USD</u>	<u>CAD</u>		
		1.0000	-		169,740	
Total return on investment including holdback amounts:					\$ 1,338,265	IRR Test Passed?
				ROI	89%	
				IRR	14%	YES
Paymentus - IPA Payable Calculation:						
Base investment earnings for IPA purposes				\$	1,168,525	
<u>less:</u> amount to be distributed to Roseway (per IPA workbook analysis):					(668,054)	
Adjusted earnings participation entitlement				\$	500,471	
Earnings participation entitlement					20%	
Total IPA previously paid to the Manager					100,094	paid
Paymentus - Holdback Proceeds IPA Payable Calculation #1:						
Divestment proceeds received		<u>FX Rate</u>	<u>USD</u>	<u>CAD</u>		
		1.0000	-	\$	169,740	
<u>less:</u> amount to be distributed to Roseway (per IPA workbook analysis):					(33,948)	
Adjusted earnings participation entitlement				\$	135,792	
Earnings participation entitlement					20%	
Total IPA Payable to the Manager					27,158	Audit and Valuation Committee Chair Approved but not
Paymentus - Holdback Proceeds IPA Payable Calculation #2:						
Divestment proceeds received March 25, 2013		<u>FX Rate</u>	<u>USD</u>	<u>CAD</u>		
		0.0000	-	\$	429,290	
<u>less:</u> amount to be distributed to Roseway (per IPA workbook analysis):					(85,858)	
Adjusted earnings participation entitlement				\$	343,432	
Earnings participation entitlement					20%	
Total IPA Payable to the Manager				\$	68,686	

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.
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